Supreme Court, U.S.
FILED
NOV 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-612

In The
Supreme Court of the United States
October Term, 1986

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a United States corporation, and FRED OGOLIN,

Appellants,

v.

MILDRED FLANIGAN,

Appellee.

On Appeal From the Supreme Court of Montana

APPELLANTS' REPLY BRIEF

*Clark Waddoups
Matthew B. Durrant
Kimball, Parr, Crockett & Waddoups
185 South State Street
Suite 1300
Salt Lake City, Utah 84111
(801) 532-7840

Attorneys for Appellants

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. THE CONSTITUTIONAL ISSUES PRESENTED BY PRUDENTIAL FEDERAL'S JURISDICTIONAL STATEMENT WERE TIMELY RAISED BELOW	1
II. THE FACT THAT FLANIGAN HAS RECEIVED THE JUDGMENT AMOUNT DOES NOT MOOT THIS APPEAL	5
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
Aetna Life Insurance Company v. Lavoie, — U.S. —, 106 S.Ct. 1580 (1986)	5
Braniff Airways v. Nebraska State Board of Eq. & A., 347 U.S. 590 (1954)	2
Fay v. Noia, 372 U.S. 391 (1963)	9
Groves v. Groves, 567 P.2d 459 (Mont. 1977)	8
Johnson v. Zerbst, 304 U.S. 458 (1938)	9
Kane v. Roxy Theatres Corporation, 63 F.2d 754 (2nd Cir. 1933)	8
Leader Clothing Co. v. Fidelity & Casualty Co. of N.Y., 227 F.2d 574 (10th Cir. 1955)	7
Montana Nat. Bank of Roundup v. State, Dept. of Rev., 539 P.2d 722 (Mont. 1975)	7
State v. Rafn, 304 P.2d 918 (Mont. 1957)	7
Vachon v. New Hampshire, 414 U.S. 478 (1974)	2
Webb v. Crane Co., 80 P.2d 698 (Ariz. 1938)	7
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)	4

INTRODUCTION

This brief is submitted pursuant to Supreme Court Rule 16.5 by appellants Prudential Federal Savings & Loan Association (hereinafter "Prudential") and Fred Ogolin (unless otherwise clear from the context, Prudential Federal and Fred Ogolin will be referred to jointly as "Prudential Federal") in opposition to the motion of appellee Mildred Flanigan (hereinafter "Flanigan") to dismiss their appeal to this Court. Flanigan seeks such dismissal on the grounds that (1) the constitutional issues presented by Prudential Federal's jurisdictional statement were neither raised by Prudential Federal in the Montana Supreme Court nor considered by that court, and (2) the appeal is moot because Flanigan has received payment of the judgment. Neither of these arguments can withstand scrutiny. Prudential Federal's constitutional challenge was *both* asserted and considered below. Moreover, the law is clear that the payment of a money judgment does not render an appeal of that judgment moot, particularly when, as here, the judgment was paid involuntarily.

I. THE CONSTITUTIONAL ISSUES PRESENTED BY PRUDENTIAL FEDERAL'S JURISDICTIONAL STATEMENT WERE TIMELY RAISED BELOW.

Prudential Federal has set forth at length in its jurisdictional statement its position with respect to the timeliness issue and will not reiterate that position here, except to respond to four arguments made by Flanigan in her motion to dismiss.

First, Flanigan argues that a constitutional claim raised implicitly below cannot be the basis for an appeal to

this Court. In support of this argument, however, Flanigan offers only cases stating the long-accepted principle that constitutional issues must be raised below, none of which consider the question of whether and how such an issue may be *implicitly* raised. Flanigan makes no attempt whatever to distinguish, indeed, does not so much as refer to, the cases cited by Prudential Federal in its jurisdictional statement which specifically provide that a constitutional issue may be implicitly raised. *See Braniff Airways v. Nebraska State Board of Eq. & A.*, 347 U.S. 590 (1954); *Vachon v. New Hampshire*, 414 U.S. 478 (1974).

Second, Flanigan argues that Prudential Federal did not implicitly raise a due process issue in its original brief to the Montana Supreme Court because it did not use "signal words, such as 'due process,' 'unfair,' 'fundamental fairness,' or similar language that would suggest a federal constitutional 'due process' issue . . . .' " (Flanigan's motion to dismiss, p. 8.) This contention is simply wrong. In its original brief to the Montana Supreme Court, Prudential Federal argued as follows:

> [S]ince PFS, at the time the plaintiff's employment was terminated, could have had no *notice* that its conduct could subsequently be regarded as wrongful and since no question of outrage was present, it is patent that the district court erred in submitting the question of punitive damages to the jury . . . . This Court has emphasized that the concepts of *elemental fairness* would prohibit an award of punitive damages against an employer in [a] wrongful termination case where the employer could not know that its conduct would be regarded, at a much later date, as wrongful.

(Appendix to Prudential Federal's jurisdictional statement, p. 37.) (Emphasis added.)

Prudential Federal's argument with respect to "elemental fairness" goes well beyond "suggesting" a due process issue. The principle of elemental fairness is at the very heart of due process, as is the principle of notice. Moreover, to argue that "elemental fairness" is not "similar language" to "fundamental fairness" is pedantry of the highest order. Even a cursory review of Prudential Federal's original brief to the Montana Supreme Court makes clear its implicit due process argument. (See pages 47 through 57 of Prudential Federal's appellate brief to the Montana Supreme Court, which appear in the appendix to Prudential Federal's jurisdictional statement, pp. 32-43.)

Third, Flanigan argues that the Montana Attorney General's not having received notice of Prudential Federal's constitutional challenge to the state punitive damages statute "is yet another reason why it could not, and would not, be considered by the Montana courts." (Flanigan's Motion to Dismiss, p. 9 n.3.) This argument ignores the fact that Prudential Federal's argument as to notice and elemental fairness was, in fact, considered by the Montana Supreme Court:

> Appellants argue that they had no notice that their conduct would be subject to punitive damages. However, the punitive damage statute, § 27-1-221, MCA, was in effect at the time appellants committed the subject acts. Appellants were fully apprised that malicious or oppressive conduct on their part could lead to the imposition of punitive damages.

(Appendix to Prudential Federal's jurisdictional statement, p. 18.)

It is not enough for Flanigan to argue that the Montana Supreme Court *might have* rested its decision on a

particular independent state ground. She must show that the Montana Supreme Court did, in fact, do so. As this Court has made clear, that the state court "might have, but did not, invoke state law does not foreclose jurisdiction here." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

The record is clear that the Montana Supreme Court did not rest its decision on the ground of failure of notice to the Attorney General. Indeed, this is the first time Flanigan has ever raised the issue.

Moreover, the state of Montana has been in no way prejudiced, the Montana Supreme Court having sustained the constitutionality of the punitive damages statute. Further, despite having been served with Prudential Federal's writ for an injunction and jurisdictional statement to this Court, the Montana Attorney General has made no response, choosing instead to rely upon the efforts of Flanigan's counsel to argue the constitutionality of the statute.

Fourth, Flanigan asserts that Prudential Federal did not raise its Eighth Amendment claim in connection with its petition for rehearing before the Montana Supreme Court. A reading of the petition for rehearing demonstrates this assertion to be in error. Prudential Federal asserts as follows in that petition:

> "[t]his Petition for a rehearing is, to a significant extent, based upon the recent directive that has been given by the United States Supreme Court to state courts that punitive damage awards must be analyzed in terms of the Federal Constitutional rights of the Defendants: . . . ."

(Appendix to Prudential Federal's jurisdictional statement, p. 45.) Prudential Federal then proceeds to quote a

portion of this Court's decision in *Aetna Life Insurance Company v. Lavoie,* — U.S. —, 106 S.Ct. 1580 (1986) that makes specific reference to Excessive Fines Clause analysis.

Regardless, even if it is assumed that Prudential Federal did not adequately raise the Excessive Fines Clause question in its petition for rehearing, because this Court has jurisdiction of cases, not questions, it has jurisdiction over the Excessive Fines issue on the basis of Prudential Federal's implicit invocation of the Due Process Clause in its original brief to the Montana Supreme Court or its explicit invocation of the Due Process and Contract Clauses in its petition for rehearing. (*See* Prudential Federal's jurisdictional statement, pp. 12-13.)

II. THE FACT THAT FLANIGAN HAS RECEIVED THE JUDGMENT AMOUNT DOES NOT MOOT THIS APPEAL.

Flanigan further argues that Prudential Federal voluntarily satisfied the judgment against it, thereby mooting this appeal. A brief review of the facts surrounding Flanigan's receipt of the judgment amount demonstrates this assertion to be wholly unsupported.

Following judgment in this action, the district court ordered Prudential Federal to post a supersedeas bond in the amount of $1,645,000. In lieu of posting such a bond, Prudential Federal placed $2,000,000 in U.S. Treasury Notes in an escrow account with the First Bank Butte. (A copy of the escrow agreement appears in the appendix to Flanigan's motion to dismiss, pp. 2-8.) The escrow agreement provided as follows:

> In the event the judgment . . . is affirmed upon appeal, Flanigan shall have the right to immediately

> demand and receive after remittitur the delivery of the securities by First Bank up to the amount of final judgment. . . .

(Appendix to Flanigan's motion to dismiss, p. 5.) On the basis of the escrow agreement, the district court stayed execution upon the judgment pending final decision on appeal. (A copy of the order staying execution is included in the appendix to Flanigan's motion to dismiss, pp. 9-11.)

On June 5, 1986, the Montana Supreme Court affirmed the judgment. It denied Prudential Federal's petition for rehearing on Friday, July 11, 1986. Plaintiff instructed the First Bank Butte to sell the U.S. Treasury Notes at 8:30 a.m. on the next Monday, July 14, 1986, and pursuant to that instruction, a check was issued in the amount of $1,676,581.51 to Flanigan.

On July 29, 1986, Prudential Federal gave Flanigan notice of its intent to appeal the decision of the Montana Supreme Court to the United States Supreme Court, and of its intent to seek an injunction requiring that Flanigan place the judgment in an escrow account pending review by the United States Supreme Court. Prudential Federal subsequently submitted a petition to the Montana Supreme Court to issue such an injunction, which petition was denied. Prudential Federal's petition for a writ of injunction submitted to Justice Rehnquist was also denied.

Flanigan argues that Prudential Federal is barred from appealing to this Court because the escrow agent paid Flanigan the judgment amount. The argument is wholly without merit. First, the judgment was not, as Flanigan asserts, paid voluntarily. Second, even if it were

assumed that Prudential Federal paid the judgment voluntarily, such payment would not bar appeal.

"It is a settled rule in the federal courts that the payment of a judgment does not bar an appeal therefrom where repayment may be enforced." *Leader Clothing Co. v. Fidelity & Casualty Co. of N.Y.*, 227 F.2d 574, 575 (10th Cir. 1955). So, too, is this the rule under Montana state law: "A defeated party's compliance with the judgment renders his appeal moot only where the compliance makes the granting of effective relief by the appellate court impossible." *Montana Nat. Bank of Roundup v. State, Dept. of Rev.*, 539 P.2d 722, 725 (Mont. 1975).

The Montana Supreme Court emphasized in the case of *State v. Rafn*, 304 P.2d 918 (Mont. 1957) that even a voluntary payment of a judgment does not necessarily bar an appeal. The court recognized this to be the law,

> notwithstanding a contrary dictum in *In re Black's Estate*, 32 Mont. 51, 79 P. 554, to the general effect that when a judgment has been paid it has passed beyond review, the satisfaction of it being the end of the proceeding. This is not always true in every case even of a judgment for money damages when payment is voluntarily made and generally speaking is clearly an incorrect statement of the law when payment or performance otherwise is involuntary.

Id. at 919-20.

In support of its holding, the *Rafn* court cited the case of *Webb v. Crane Co.*, 80 P.2d 698, 708 (Ariz. 1938), which sheds further light upon the voluntariness question:

> [T]here are cases deciding that one paying a judgment against him precludes all appeal therefrom. The better view, we think, is that though execution has not

> issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of his right to appeal, unless payment be by way of compromise and settlement or under an agreement not to appeal or under circumstances leaving only a moot question for determination.

(Quoting Freeman on Judgments, Vol. 2, Fifth Edition, p. 2419 ¶ 1165.)

Thus, the voluntariness question turns on whether the payment was made under an agreement not to appeal. There is no basis whatever for the argument that Prudential Federal waived its right to appeal in connection with payment to Flanigan of the judgment amount. Neither the escrow agreement nor the assignment make any mention of any such waiver, and these documents constituted the "full agreement between the parties." (Appendix to Flanigan's motion to dismiss, p. 7.)

It is well established under both Montana and federal law that the right of appeal can be waived only if the language of the waiver is extremely clear and unambiguous. As the Montana Supreme Court held in finding that a stipulation did "not amount to a clear showing the parties intended to preclude any right of appeal":

> Such an agreement should be very clear on its terms, and leave no doubt of the intention of the party to cut himself off from the right of appeal.

Groves v. Groves, 567 P.2d 459, 461 (Mont. 1977). The same rule has been long established as a matter of federal law. *See, e.g., Kane v. Roxy Theatres Corporation*, 63 F.2d 754, 756 (2nd Cir. 1933).

Moreover, in addition to being clear and unambiguous, the waiver of a right must be knowing and intentional. The United States Supreme Court has enunciated the classic definition of waiver as "an intentional relinquishment or abandonment of a known right or privilege." *Fay v. Noia*, 372 U.S. 391, 439 (1963) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

In the face of this rigorous standard, Flanigan can point only to two documents serving in lieu of a supersedas bond, which do not so much as mention waiver of appeal, as constituting waiver. The simple fact is that if the parties had intended to waive appeal to this Court, they could have done so within the escrow agreement in one sentence. The escrow agreement and assignment were intended merely to protect Flanigan's judgment pending appeal to the Montana Supreme Court, not to waive Prudential Federal's right of appeal to this Court.

———o———

CONCLUSION

Prudential Federal implicitly challenged the constitutionality of the Montana punitive damages statute in its original brief to the Montana Supreme Court and that challenge was considered by the Montana Supreme Court. Moreover, that challenge was made explicit in Prudential Federal's petition for rehearing to that court. Finally, Flanigan's contention that Prudential Federal voluntarily paid the judgment amount and waived its right to appeal is wholly without support. Accordingly, Flanigan's motion to dismiss should be denied.

DATED this 17 day of November, 1986.

Respectfully submitted,

*Clark Waddoups
Matthew B. Durrant
Kimball, Parr, Crockett
& Waddoups
185 South State Street
Suite 1300
Salt Lake City, Utah 84111
(801) 532-7840

Attorneys for Appellants

*Counsel of Record